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Supreme Court, U.S.
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No. 02-236

In The

Supreme Court of the United States

YVONNE BURKE, DONALD KNABE, GLORIA MOLINA, ZEV YAROSLAVSKY, and MICHAEL ANTONOVICH,

Petitioners,

v.

JAVIER ROCHA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

LOUIS R. MILLER, III
Counsel of Record
for Petitioners
CHRISTENSEN, MILLER, FINK, JACOBS,
GLASER, WEIL & SHAPIRO, LLP
2121 Avenue of the Stars, Eighteenth Floor
Los Angeles, California 90067
(310) 553-3000

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Pursuant to Supreme Court Rule 15.6, Petitioners Yvonne Burke, Donald Knabe, Gloria Molina, Zev Yaroslavsky and Michael Antonovich hereby submit this reply brief in support of their petition for *writ of certiorari* to address new points raised in Respondent Javier Rocha's opposition brief.

Respondent argues in his opposition that his voluntary dismissal of this action in the district court below three days after the petition for *writ of certiorari* was filed renders the petition moot. Petitioners already submitted a Supplemental Brief citing to on-point authority which holds otherwise. They will not repeat those arguments here. Respondent's opposition brief, however, demonstrates that Respondent dismissed this case below to manipulate this Court's *certiorari* jurisdiction.

Respondent's counsel states that he executed the stipulation for dismissal on July 10, 2002. This is impossible. The stipulation was not provided to him until eight days later, on July 18, 2002, when Respondent's counsel offered to dismiss the case. On that date, Respondent's counsel was provided with a stipulation of dismissal but did nothing until after the *certiorari* deadline had passed. He filed the dismissal on August 16, 2002, *after* he was served with the petition.

Respondent's counsel made a tactical decision to delay filing his dismissal. He waited to see if Petitioners would rely on his promise to dismiss the case and, in the process, forego seeking review by this Court. Once the petition was filed, however, counsel immediately dismissed the action

and now argues that the dismissal gives this Court no choice but to deny the petition as moot. This tactical manipulation should not be permitted to affect the substantive issues here.

Petitioners cited two cases in their Supplemental Brief which deal with precisely this type of conduct: *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 659, 113 S.Ct. 2297 (1993) and *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070 (1982). In both cases, this Court refused to consider a matter moot after one of the parties voluntarily terminated the underlying conduct at issue. That is precisely what happened here.

Respondent's cited authorities regarding mootness do not apply here. In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 284, 120 S.Ct. 1382 (2000), the owner of a nude dancing establishment challenged a local ordinance banning nudity. The Pennsylvania Supreme Court struck down the ordinance, and the City filed a petition for *writ of certiorari*. *Id.* at 286. Immediately thereafter, the owner moved to dismiss the petition on the ground that he no longer operated a nude club and that the case was moot. *Id.* at 287.

This Court denied the motion, recognizing that the owner was free to resume his operations in the future and that he improperly sought to moot the action in order to prevent his favorable ruling from possibly being overruled by this Court: "Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness." *Id.* at 288.

Respondent's reliance on *U.S. v. Hamburg-Amerikanische Packetfahrtactien Gesellshaft*, 239 U.S. 466, 475, 36 S.Ct. 212 (1916), is equally misplaced. That case refused to consider "prophe[tic] future conditions" as sufficient to avoid dismissal on mootness grounds. The future harm here, however, is not prophetic; it is *guaranteed*.

Petitioners will be moving for summary judgment in one of the cases filed against them, *Benas v. Baca*, 00-CV-11507, in the next few weeks. The Ninth Circuit law discussed in the petition for *writ of certiorari* denies Petitioners absolute immunity and subjects them to burdensome discovery before qualified immunity may be adjudicated. These authorities are binding on the district court which will consider Petitioners' summary judgment motion.

Respondent's claim of mere prophecy is also undercut by his counsel's own words. Counsel promised to keep suing Petitioners and has lived up to that promise; at least three identical cases have been filed against Petitioners but not yet served. Respondent's attempt to manipulate this Court's jurisdiction and to deny the Court the ability to correct the Ninth Circuit's immunity decisions should not be permitted.

CONCLUSION

For the foregoing reasons, Petitioners assert that the issues raised in their petition for *writ of certiorari* are not rendered moot by way of Respondent's dismissal of this action in the district court below and request that this Court grant their petition to prevent the erosion of absolute and qualified immunity afforded to elected legislators.

Respectfully submitted,

LOUIS R. MILLER, III
Counsel of Record for Petitioners

CHRISTENSEN, MILLER, FINK, JACOBS,
GLASER, WEIL & SHAPIRO, LLP
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Los Angeles, California 90067
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